UNITED
NATIONS

TD

United Nations Conference
on Trade and Development

Distr.
GENERAL

TD/CODE TOT/58
22 October 1992

Original: ENGLISH

UNITED NATIONS CONFERENCE ON AN INTERNATIONAL
CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY

# NEGOTIATIONS ON AN INTERNATIONAL CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY: CONSULTATIONS CARRIED OUT IN 1992

Report by the Secretary-General of UNCTAD

Note by the UNCTAD secretariat

Attached is the report by the Secretary-General of UNCTAD on the above subject, as submitted to the General Assembly at its forty-seventh session.

GE.92-52695 (E)

INTRODUCTION

1. Pursuant to General Assembly resolution 32/88 of December 1977, the United Nations Conference on an International Code of Conduct on the Transfer of Technology was convened under the auspices of UNCTAD to negotiate a code of conduct and take all necessary decisions for its adoption. Since 1978, six sessions of the Conference have been held. Despite substantial progress, during the sixth session, held in Geneva from 13 May to 5 June 1985, 1/ differences still remained on the major issues outstanding in chapters 4 and 9, dealing respectively with restrictive practices and applicable law and settlement of disputes. Since the sixth session, the Secretary-General of UNCTAD and the President of the United Nations Conference on an International Code of Conduct on the Transfer of Technology have held consultations with interested Governments for the purpose of bringing the negotiations to an appropriate conclusion. These consultations have revealed that divergences remain on conceptual questions in chapter 4, regarding the manner in which restrictive practices in transfer of technology transactions should be treated in an international code. Likewise, in respect to chapter 9, different approaches have been advocated by those countries favouring a clearer recognition of the freedom to choose the law applicable to their contractual relations and those wishing to stress the observance by the parties of the laws of their individual countries from which a contract must not derogate.

2. Despite the efforts made to find a compromise, the approaches of Governments to resolving these issues, which are central to the draft code, have remained divergent. 2/ During the consultations held in 1991, a general agreement was reached to relaunch the negotiating process on the basis of a "fresh approach" to the concept of a code in the light of important changes that had taken place in the area of technology policies during the previous decade. To this end, it was agreed in principle to establish an intergovernmental group of experts in UNCTAD to prepare the ground for the resumption of negotiations. However, the Governments were unable to reach full agreement on the formulation of the terms of reference. 3/

3. The present report gives an account of subsequent consideration of the question by UNCTAD VIII and further consultations carried out by the Secretary-General of UNCTAD.

I. RECENT DEVELOPMENTS

4. The General Assembly in taking note of the report of the Secretary-General of UNCTAD on the above-mentioned consultations decided, in its resolution 46/214 of 20 December 1991, to transmit the report of the Secretary-General of UNCTAD to the United Nations Conference on Trade and Development at its eighth session.

5. Pursuant to the aforementioned General Assembly resolution, the United Nations Conference on Trade and Development, at its eighth session, reviewed the work carried out during negotiations on an international code of conduct on the transfer of technology as well as the results of consultations held in 1991. The basic divergence of views on the treatment of restrictive practices in transfer of technology transactions and the choice of law

remained the main obstacle to full agreement on the terms of reference of the intergovernmental group of experts which would be charged with preparing the ground for the resumption of successful negotiations.

6. The Conference adopted the Cartagena Commitment which, in its paragraph 173, recognized that "conditions do not currently exist to reach full agreement on all outstanding issues in the draft code of conduct. Should Governments indicate, either directly or through the Secretary-General of UNCTAD reporting according to General Assembly resolution 46/214, that there is the convergence of views necessary to reach agreement on all outstanding issues, then the Board should re-engage and continue its work aimed at facilitating agreement on the code. 4/

7. Subsequent to the Cartagena Commitment, the Secretary-General of UNCTAD asked the Governments to provide him with their views on the issues outstanding in the draft code of conduct, in particular on the acceptability of:

- Exclusive application of competition law principles to the evaluation of restrictive practices;

- Adherence to freedom of contract and freedom of choice in respect to applicable law and forum for dispute settlement.

At the time of writing of this report, replies had been received from 10 Governments. The summaries of those replies containing specific comments on the outstanding issues are contained in the annex to this report.

## II. CONCLUSIONS

8. Given the limited number of replies received to date, it appears advisable to collect a wider range of views of Governments on the outstanding issues in the draft code of conduct on the transfer of technology, in order to bring the consultations to a more conclusive outcome. To this end, and in the light of paragraph 173 of the Cartagena Commitment, the Secretary-General of UNCTAD intends to collect a larger sample of views from Governments on all outstanding issues in the draft code of conduct and to prepare a more comprehensive report to the General Assembly at its forty-eighth session.

## Notes

1/ See, "The Sixth Session of the United Nations Conference on an international code of conduct on the transfer of technology" (TD/CODE TOT/49).

2/ See, "The relevance of recent developments in the area of technology to the negotiations on the draft international code of conduct on the transfer of technology" (TD/CODE TOT/55).

3/ See text under consideration in the appendix to "Further consultations on a draft international code of conduct on the transfer of technology, report by the Secretary-General of UNCTAD" (TD/CODE TOT/57).

4/ It should be noted that subsequent to UNCTAD VIII, the United Nations Conference on Environment and Development adopted Agenda 21 which provides in its chapter 34.18 that "Governments and international organizations should promote, and encourage the private sector to promote, effective modalities for the access and transfer in particular to developing countries of environmentally sound technologies by activities, including the following:

...

(f) Develop mechanisms for the access to and transfer of environmentally sound technologies, in particular to developing countries, while taking into account development in the process of negotiating an international code of conduct on transfer of technology, as decided by UNCTAD at its eighth session in Cartagena."

ANNEX

Summary of replies by Governments

Canada: The Government of Canada is of the view that the exclusive application of competition law principles to the evaluation of restrictive practices, and the adherence to freedom of contract and freedom of choice in respect to applicable law and forum for dispute settlement must be accepted by all members of UNCTAD. The Government, therefore, continues to adhere to the position adopted by Group B at the consultations held in April 1991 on the formulation of terms of reference for an intergovernmental group of experts to prepare the ground for the resumption of negotiations on the code.

China (The People's Republic of): The Government of China considers that, owing to the joint efforts of regional groups and Governments for many years, the negotiations on an international code of conduct on the transfer of technology has made progress. It is the opinion of the Government that the successful formulation of an international code of conduct on the transfer of technology will benefit all countries. Therefore, the Government expresses its great appreciation for the initiatives undertaken to convene an intergovernmental expert group to prepare the ground for the resumption of negotiations on the draft code. While it is recognized that a divergence of views still exists with regard to some outstanding issues, in particular on the treatment of restrictive practices in transfer of technology transactions and on the choice of law in technology contracts, the Government is of the view that "development" is the ultimate aim while "competition" could be the main principal guideline on how to achieve sustainable development. The Government also expresses its flexibility on adherence to freedom of contract and freedom of choice in respect to the applicable law and forum for dispute of settlement. Finally, the Government of China believes that a further exchange of views on a mutually beneficial basis could find the appropriate solution to the differences still existing with regard to the outstanding issues.

Czech and Slovak Federal Republic: It is the view of the Government of the Czech and Slovak Federal Republic that both of the principles, namely the exclusive application of competition law principles to the evaluation of restrictive practices, and the adherence to freedom of contract and freedom of choice in respect of applicable law and forum for dispute settlement, are acceptable for the Government.

Iraq: The Government of Iraq expresses its appreciation for the efforts made on the basis of a "fresh approach" to the concept of a code, during the consultations held in April 1991 for the formulation of the terms of reference for an intergovernmental group of experts to prepare the ground for resumption of negotiations on the draft code. The Government is of the opinion that a full agreement on formulation of the code of conduct would be beneficial to the technological development process of developing countries.

Netherlands: The Government of the Netherlands extends its support, in principle, to the initiatives aimed at the completion of an international code of conduct on the transfer of technology acceptable to all concerned parties. This is particularly needed now as technology plays a prominent role in the

process of sustainable development. Therefore, the Government of the Netherlands is of the opinion that consultations based on a "fresh approach" to the concept of a code should continue, taking into account all developments during last year on the subject. The Government considers that the establishment of an intergovernmental group of experts (IGE) could constitute an important step forward. In this respect, the Government expresses its appreciation for the continued efforts of the Secretary-General of UNCTAD for exploring all avenues leading towards a useful resumption of negotiations. It is also stressed that if negotiations were resumed, the draft code's universal application should be guaranteed. It is added that it should be kept in mind that most of technology is controlled by private industry. With respect to the outstanding issues in the formulation of the terms of reference of the IGE, the Government submits the following:

- Although the evaluation of restrictive practices should take place primarily on the basis of criteria of competition, the Government can also accept that the criteria of development be taken into account;

- The principles of freedom of choice with respect to applicable law and forum for dispute settlement have to be maintained uncurtailed.

Finally, it is the view of the Government of the Netherlands that the proposed IGE should take into account in its work relevant developments in other international forums, especially the negotiations on TRIPS within the Uruguay Round negotiations.

Niger: With regard to the establishment of an intergovernmental group of experts to prepare the ground for the resumption of negotiations on the draft code of conduct, the Government of Niger expresses its desire to participate in the work of such a group of experts.

Philippines: With respect to the outstanding issues in the draft code of conduct on the transfer of technology, namely: exclusive application of competition law principles to the evaluation of restrictive practices; and adherence to freedom of contract and freedom of choice in respect of applicable law and forum for dispute settlement, the Government of the Philippines expresses its reservation on the acceptability of both issues.

Saint Lucia: The Government of Saint Lucia subscribes to the views expressed on the two outstanding issues by the Group of 77 at the consultations held in April 1991 on the draft code of conduct on the transfer of technology.

Switzerland: The Government of Switzerland continues to adhere to the position adopted by Group B at the consultations held in April 1991 on the subject. The Swiss Government is of the view that both principles related to the treatment of restrictive practices and the choice of law and forum must be accepted by all members of UNCTAD for a resumption of negotiations on the draft code of conduct.

United States of America: The Government of the United States is of the opinion that there is no basis to believe that there is a "convergence of views" on the outstanding issues in the draft code of conduct, nor is there likely to be. Therefore, the Governmen opposes resumption of negotiations on the draft code of conduct on the transfer of technology.

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